

J10YJ855

Briggs v Laditan

Judgment

*I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic*

1. This is the reserved judgment in the matter that was heard on 23 June 2022. The submissions regarding the “new” scheme for the determination of Road Traffic Accident Small Claims pursuant to CPR PD27B lead me to reserve the Judgment.
2. The matter arises out of a road traffic accident which occurred on the 8 June 2021. The claim was, properly, entered onto the OIC by SCNF dated the 22 September 2021. In the Compensator Response Form, dated 11 November 2021, liability was admitted in full. The parties have been unable to agree the value of the Claim and, therefore, a Form RTASC Q was issued by the Court on 10 March 2022 with the date of service (following an amendment) being 6 April 2022. An RTAASQ was filed and further evidence relating to physiotherapy was attached. The Court Valuation Form set out that the Claimant claimed £400.00 in respect of physiotherapy treatment; £840.00 in respect of a Tariff injury; and £3,000.00 in respect of a non-tariff injury. The Compensator offers are £280.00, £840.00 and £700.00 respectively.
3. Directions were given by me on 19 May 2022 which listed the matter for a preliminary hearing to determine the issues in the case. The order made clear that, if the parties agreed, the Court would use the hearing as a final hearing pursuant to CPR 27.4(3)(b) and would assess quantum on the basis of submissions. I also gave permission to the Defendant to rely upon the additional evidence filed with the RTAASQ.
4. Somewhat fortuitously, the Court had the luxury of some time in the list on the morning of the hearing due to another matter being vacated. That morning, I had handed down a decision on paper, Rabot v Hassam which dealt with the quantification of tariff and non-tariff injuries. Mr Seed, who represented the Claimant, was also involved in that case and had seen and considered it accordingly. Miss Mahmood who represented the Defendant, had not. The Court

was able to afford her time to take instructions on the matter and formulate submissions as appropriate. Those who instruct her wished the matter to proceed to assessment and, given the Claimant agreed, submissions as to quantum, and particularly the approach to quantum, were made.

5. The point, as will be seen, is different to the one addressed in Rabot.

### Physiotherapy

6. Firstly, in terms of physiotherapy charges, the somewhat familiar arguments were raised. The Defendant points to an intervention letter dated 14 July 2021 wherein they offer physiotherapy at a price lower than that which was paid. The Claimant underwent an initial assessment as to physiotherapy needs on 14 July 2021. The first actual session took place on the 28 July 2021. The intervention letter of the Defendant references a notification in the portal response and “reiterates” an offer of physiotherapy. It does not appear this earlier response is in the Court pack or within the extra documents appended to the RTAASQ.
7. The Defendant argues that the offer was “in time” and the Claimant ought to have availed himself of the less costly treatment. They say the offer contained sufficient detail to allow him to make an informed choice as to his treatment and, therefore they say the letter was “Copley compliant” or, more properly, in accordance with the Court of Appeal case Copley v Lawn [2009] EWCA Civ 580. Accordingly, they offer the sum of £210.00 in respect of physiotherapy charges.
8. The Claimant says the offer was too late to be of any effect and seek £400.00 (as evidenced by an invoice).
9. Overall, in my view, the letter could be an effective intervention letter. It does not give the name of a proposed therapist but it gives an assurance as to their professional qualification, geographical location and total cost which would have enabled the Claimant to make a comparison of costs accordingly. However, in this case it does not avail the Defendant because it was too late in time. The initial assessment took place on the same day as the letter and, in my view, it would not have been reasonably expected of the Claimant to change provider after the treatment programme had been mapped out. Whilst the letter I have seen makes mention of an earlier offer, without seeing that earlier document, I cannot make any assessment of its terms.
10. Therefore, £400.00 is awarded under this head of loss.

### Damages for the Injuries

### The legislation

11. Clearly, at least part of this claim relates to a whiplash injury as defined by the Civil Liability Act 2018 which came into force in respect of all whiplash injuries after 31 May 2021.

12. The Act defines Whiplash injury as:

#### **1. Whiplash Injury etc:**

*(1) In this Part “Whiplash injury” means an injury of a soft tissue in the neck, back or shoulder that is of a description falling within subsection (2), but not including an injury excepted by subsection (3).*

*(2) An injury falls within this subsection if it is –*

- a. A sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or*
- b. An injury of a soft tissue associated with a muscle, tendon or ligament in the neck, or shoulder.*

*(3) An injury is excepted by this subsection if –*

- a. It is an injury of soft tissue which is part of or connected to another injury; and*
- b. The injury is not an injury of soft tissue in the neck, back or shoulder of a description falling within subsection (2).*

13. The level of damages for Whiplash injuries are to be assessed in accordance with the Whiplash Injury Regulations 2021 SI 2021 No. 642.

14. Both parties agree that the Claimant sustained a whiplash injury to the neck and upper and lower back within the meaning of the Act and, given the prognosis is one of 9 months, the appropriate tariff amount is £840.00.

15. The parties agree that, in this case, there is clearly a non-tariff element to this injury which will fall to be quantified in the traditional way and in accordance with the JC Guidelines. For the avoidance of doubt, unlike Rabot, the Claimant does not accept that there is to be a deduction in the overall award to represent the overlap in pain, suffering and loss of amenity occasioned by the tariff and non-tariff injuries (although they do accept that, as here, where there is more than one non-tariff injury, there is a deduction for the overlap between those non-tariff injuries in the traditional way).

### The Claimant's case

16. The Claimant was examined at about 3 months post-accident by Dr Ayyoub. The conclusion was that the Claimant sustained an injury to the neck and upper and lower back, all with a prognosis period of 9 months. That, of course, falls within the tariff. In addition, there were injuries to the left knee, left elbow, chest and hips. They are all the non-tariff elements.
17. The injury to the elbow came on after 24 hours from the accident and was said to be moderate. The injury resolved after 3 months.
18. The injury to the chest came on after 24 hours, it was said to be moderate and resolved after 2 months.
19. The injury to the hips came on after 24 hours. It was said to be mild to moderate and resolved after 1 month.
20. The injury to the left knee came on after 24 hours. It was said to be moderate to severe but had improved to moderate at the time of the examination.
21. On examination, the range of movement in the knee was restricted by approximately 10% due to there being pain at the limits of movement. Examination of the chest and hips was normal. There was a full and pain free range of movement to the left elbow but a very faint bruising mark was seen.
22. The Police and ambulance attended the scene of the accident. The Claimant was taken to hospital and prescribed morphine. By the time of examination, he had undergone 4 sessions of physiotherapy (the medical report erroneously states 5). The treatment is said to have been beneficial.
23. The Claimant took 4 days off work as a taxi driver before returning to normal duties and hours. There were no other significant problems caused in terms of loss of amenity.
24. The report concludes that the injuries to the left elbow, chest, left knee and hips were caused by soft tissue injuries due to the accident.
25. An overall prognosis for the knee injury is given as 6 months. A further 2 – 3 sessions of physiotherapy was advised but the advice is unspecific as to why and in respect of which injury.

26. Mr Seed for the Claimant argues that my task is first to value the tariff injury and the non-tariff injuries in this case. That will give two separate figures that then should just be added together to give the whole award. He accepts that, if there is more than one non-tariff injury (as here), those injuries will need to be valued in accordance with the traditional approach and the pre-amble to the JC Guidelines at page xix. In particular, paragraph 34 of the judgment of Pitchford LJ in Sadler v Filipak [2011] EWCA Civ 1728

*It is in my judgment always necessary to stand back from the complication of individual figures, whether assistance has been derived from comparable cases or from the [Judicial College] guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary.*

27. In other words, there will be an appropriate deduction to be made in the composite award for the two or more non-tariff injuries but no further deduction.

28. He states that the rules (of the tariff) do not allow for there to be a deduction.

29. Mr Seed argues that the Regulations support him in this given that Reg. 2 is entitled, "Duration of Injury". Clearly, one can include a claim for "exceptional circumstances" or "psychological injury" but that is it. There is nothing in the Regulations that suggests a deduction between the two awards (tariff and non-tariff). As I suggested at the hearing, he considers the awards are on two separate, parallel tracks which do not meet. He agreed.

30. Mr Seed went on to say that all the Civil Liability Act 2018 provisions do is give the Court the power to conduct the task of valuing the injury (tariff and non-tariff). He argues that there is no guidance as to how to do it.

31. In terms of Sadler, he draws a distinction from the instant cases. He argues that, pre-tariff, there would be a whiplash, you would then add for the other injuries and take a step back but he argues Sadler applies to the discretionary parts of that task only. In terms of the tariff amount, he says that the Court has zero

discretion; it is ring-fenced and the discretion the Court has (or had) in accordance with Sadler does not exist. Accordingly, Sadler cannot apply to the Government dictated figure. Sadler would only apply to the non-tariff injuries if and insofar as there is more than one. Accordingly, I should simply add the figures together.

32. Mr Seed pointed out that this problem arises because the Tariff awards are low in comparison to the figures in the JC Guidelines for other injuries. We are not comparing like with like and that is what makes this task difficult.

33. Accordingly, he says that the non-tariff injuries should be valued as follows.

34. He values the left knee injury as an individual injury at about £3,000.00. That is based upon the Minor Injuries chapter of the JC Guidelines 16<sup>th</sup> Edition (which gives a figure of £2,450.00 at the top end of the bracket for 3 months) together with (K) Knee Injuries (b) Moderate (iii) which concludes as follows:

*A soft tissue strain-type injury that does not significantly impact on daily activities and gradually resolves within six to seven months might be expected to attract an award in the region of 2,250.00*

35. His overall non-tariff injury figure is one of £4,000.00 (which is reached by adding a figure of about £1,000.00 to the £3,000.00 in respect of the left elbow, hips, and chest injuries).

36. Adding the tariff element, he says that £4,000.00 plus £840.00 should be awarded overall to represent damages for the totality of the injuries (£4,840.00).

### The Defendant's submissions

37. Miss Mahmood started her submissions by valuing the non-tariff injuries in this case (left elbow, chest, hips and left knee). On instructions, she values the totality of those injuries at £700.00 having already taken what she describes as a Sadler reduction.

38. Realistically, and perfectly properly, she points out the JC Guidelines 16<sup>th</sup> Edition 7 K(b)(ii) figure of £2,250.00 and recognises that the Court may consider the award to be greater than £700.00. However, nonetheless, she argues that Sadler applies.

39. She acknowledges that the Claimant does not accept that there should be a deduction to the overall award because the Regulations do not direct it but she points out that the Regulations would not be expected to give the methodology.

40. She refers to the Civil Liability Act 2018, s.3(8) which states:

*(8)Nothing in this section prevents a court, in a case where a person suffers an injury or injuries in addition to an injury or injuries to which regulations under this section apply, awarding an amount of damages for pain, suffering and loss of amenity that reflects the combined effect of the person's injuries (subject to the limits imposed by regulations under this section).*

41. She emphasises the words, “combined effect”. Therefore, she says, the Court is looking at the combined effect of the injuries (and therefore the awards) in the same way as previously.

42. As further support for her argument, she points out that Regulation 3(1)(c) permits there to be an uplift for non-tariff injuries. It reads:

***Uplift in exceptional circumstances***

***3.—(1) Subject to paragraphs (2) and (3), a court—***

*(a)may determine that the amount of damages payable for pain, suffering and loss of amenity in respect of one or more whiplash injuries is an amount greater than the tariff amount relating to that injury or those injuries;*

*(b)may determine that the amount of damages payable for pain, suffering and loss of amenity in respect of one or more whiplash injuries, or one or more whiplash injuries and one or more minor psychological injuries, taken together, is an amount greater than the tariff amount relating to those injuries; and*

*(c)in a case where the court considers the combined effect of—*

*(i)an injury or injuries in respect of which a tariff amount is specified in regulation 2(1); and*

*(ii)one or more other injuries,*

*may determine that an amount greater than the tariff amount is to be taken into account when deciding the amount of damages payable for pain, suffering and loss of amenity in respect of the injuries mentioned in paragraphs (i) and (ii).*

43. She points out the words, “combined effect” are used in this section too.

44. Finally, she read out a passage from the Gov.UK website. She kindly forwarded the link to the page to myself and Mr Seed post-hearing. It reads:

***What is the approach for resolving mixed tariff cases?***

*This was recognised in section 3(8) of the Civil Liability Act which provides that, where a claimant suffers injuries in addition to a whiplash injury, the court is not prevented from awarding damages that reflect the combined effect of the injuries sustained.*

*Ultimately, then, the courts will need to determine how mixed injuries are addressed and we are confident that judicial expertise can resolve these cases on a day-to-day basis.*

*The Ministry of Justice are aware of the work of the cross sector working group on mixed injuries and support the principle of industry collaboration to improve the claims process for injured parties.*

45. That, she says, means the Court has to fall back on established principles and that Sadler applies. She argues it is not correct that Sadler cannot apply. To do otherwise would go against this long-established principle. She argues that the wording of the passages above gives the court the discretion to do so. She points to paragraph 36 of my earlier decision in Rabot with which, effectively, she agrees (save perhaps the quantum). In other words, the loss of amenity has to be examined and considered as being compensated for within each element of the award accordingly.

46. She points out that in this case, the loss of amenity occasioned by all of the injuries is limited: The Claimant had 4 days off work and there was no other significant effect. Whilst there was physiotherapy, there appears to have been minimal loss of amenity occasioned by the knee injury (or any of the other non-tariff injuries).

47. Accordingly, she reaches an overall award of £1,540.00 (which is £840.00 plus £700.00 which already accounts for the Sadler reduction).

### Conclusion

48. This case starts from a different standpoint to that of Rabot. The Claimant does not make the concession made therein, namely that there is to be a deduction for overlap of the tariff and non-tariff injuries. Rabot was decided using well established principles recognising that the tariff element was fixed, and yet contained an element to compensate for loss of amenity. Therefore, I took a step back and looked at the whole to make a deduction from the additional (non-tariff) element to reach an overall figure.

49. The question raised in this case is still “when there is a tariff and non-tariff element to the injury, what is the methodology that should be employed to quantify the injury as a whole?”. In my view, based upon the arguments raised in this case, that question can be broken down into the following issues:

- a. What is the appropriate award in respect of the non-tariff element of the injury?
- b. Is there to be a deduction for an overlap in the awards or not?
- c. Therefore, what is the overall figure for the totality of the injuries?

50. I am not working on the basis that this Judgment must honour the principles I concluded in Rabot but I am going to adopt some of the reasoning and, as it happens, I think my conclusions are consistent. No one has argued in this case that it matters which way round I quantify these awards. I remain of the view that it does not matter.

51. In terms of the non-tariff element, it seems to me that both parties agree I must value those in accordance with traditional principles **and** apply Sadler to that task as I did in Rabot.

52. The difference between the arguments is to what degree, and in what manner, Sadler is to be applied.

53. Mr Seed says that I should apply it only as between the non-tariff injuries. Miss Mahmood says I should apply it across the board (albeit recognises that any deduction has to be made from the non-tariff figure given the tariff is fixed).

54. It seems to me that the difference is subtle but there is a difference. Whilst, on the face of it, the issue is the size of the reduction, what Mr Seed for the claimant says is that a Sadler deduction (if any) is made from the overall non-tariff award

only. If there is only one non-tariff injury, there is nothing to deduct. It is only if there are two or more that there is a deduction as between those figures only. Thereafter, that figure is simply added to the tariff and no account is taken of any element of pain, suffering and loss of amenity within the tariff figure.

55. The Defendant's approach differs in that they say one reaches the non-tariff award and it is added to the tariff award, having already taken a deduction from that non-tariff element for the Sadler principles. However, that deduction *includes or recognises* a reduction for the element of pain, suffering and loss of amenity which is included in the tariff award (and which is going to be added).

56. The difference in these views boils down to an interpretation of the rules as set out above and, in my view, a similar point to that in Rabot.

57. Firstly, the rules and guidance notes. It seems to me that they simply make provision to allow me to make these awards. They do not give me a methodology. That chimes with the Gov.UK website which expressly states that the valuation of injuries is to be left to the Court.

58. Secondly, the Rabot principles. In that case, I was driven to the conclusion I quantify both injuries separately and I then take a step back. Plainly, my valuation of the knee/chest/hips/elbow injuries is assessed on the basis of the pain suffering and loss of amenity caused by those injuries. The Whiplash injury is quantified in accordance with the tariff. My view that that, whilst I accepted the tariff figure did not allow for any nuance, I concluded loss of amenity was covered, at least some extent, within the tariff figure (even if only on a broad-brush basis). I considered that perhaps the more appropriate way to look at it was to say that any (extra) loss of amenity occasioned by tariff injuries is not to be specifically considered until it is exceptional. I am not sure I see any reason to change my view on that issue.

59. In principle, I still reach the view that the overlap should be reached by considering all injuries and therefore the overlap of the non-tariff element with that already compensated for within the tariff. There is no reason to ring-fence overlap solely to the non-tariff element. After all, it is not the overlap in numerical amount that is being considered, it is the overlap in what the amount represents that we are concerned with; namely the degree of overlap in pain, suffering and loss of amenity.

60. In practice, I also remain of the view that I must look at the overlap in pain, suffering and loss of amenity based on the (medical) evidence before the Court.

61. Accordingly, my approach remains as per Rabot as follows:

- a. Determine what each injury is;
- b. Value each injury in accordance with whatever scheme/regime is appropriate;
- c. Add them and then step back exercising the type of Judicial discretion that Judges have been doing over many years;
- d. Reach a final figure by making an appropriate deduction (if any). If it were not clear previously, that reduction has to be from the non-tariff amount given the other is fixed although the overlap represents the overlap in pain, suffering and loss of amenity recognised within each award.

62. In other words, I am still following the guidance set out in Sadler.

*Accordingly, what is the appropriate award in respect of the non-tariff element of the injury?*

63. I take into account that the non-tariff injuries were to the left knee, left elbow, chest and hips. The duration of each injury is 6, 3, 2 and 1 month respectively. I also look to the JC Guidelines to which I have been referred. I cannot discern any particular difficulty occasioned by any of these injuries, particularly the knee injury, but they were clearly painful to a degree over a period of time. Overall, I think a free-standing award would be in the region of £3,000.00. That figure is reached by taking the JC Guideline figure of £2,250.00 in respect of the knee injury and adding an element for the other issues.

*What is to be deducted for an overlap in the awards and, therefore, what is the overall figure for the totality of the injuries?*

64. The tariff award is £840.00. Added to the £3,000.00, that gives an overall sum of £3,840.00. Stepping back, I think the overall award is £2,800.00 to recognise the clear overlap on the basis of the medical evidence I have before me. There is very little evidence in this case. The majority of the pain, suffering and what limited loss of amenity there is, appears to flow from the whiplash injury on the basis of the medical report. There is nothing highlighted in terms of particular loss of amenity that can be attributed to the knee/chest/elbow/hips injuries alone. It seems to me that it has to be accepted that at least some of the treatment will have been linked to the whiplash injuries without more within the report.

65. Mr Seed pointed out that the small value of the tariff awards is the cause of much of this difficulty. In my view, what he means is that the tariff figures do not naturally sit within the landscape of the JC Guidelines and, to that extent, at first blush one is comparing apples with pears. However, that, in my view, is not a

reason to depart from established principles without a clear reason, rule or regulation to do so. What it does mean is that the calibration of pain, suffering and loss of amenity to be taken into account as compensated for by the whiplash tariff award is different to the calibration involved in the non-tariff award. That is new and somewhat unfamiliar territory but, on careful analysis, my view is that established principles can be applied to it and that is how I have attempted to reach the valuation.

66. Given the interest in the outcome of this case and the potential effect on matters listed before me in the forthcoming days/weeks, this judgment should be considered as handed down in writing at 4 pm 12 July 2022 and Judgment will be entered for the Claimant accordingly. However, there will be a telephone hearing on 20 July 2022 at 2 pm (elh 30 minutes) to consider the question of any interest plus costs and any other matters arising. If the parties are able to agree a consent Order to deal with those outstanding issues, they are welcome to forward it to me prior to the hearing and no attendance will be necessary.

DJ Hennessy